

<p>This Opinion is not a Precedent of the TTAB</p>

Hearing: January 17, 2023

Mailed: May 19, 2023

UNITED STATES PATENT AND TRADEMARK OFFICE

Trademark Trial and Appeal Board

In re Natural Cravings Pet Treats LLC

Serial No. 90139331

James A. Stepan of Law Offices of James A. Stepan for
Natural Cravings Pet Treats LLC.

Nicole Passman, Trademark Examining Attorney, Law Office 125,
Heather Biddulph, Managing Attorney.¹

Before Cataldo, Heasley and Lebow,
Administrative Trademark Judges.

Opinion by Cataldo, Administrative Trademark Judge:

Applicant, Natural Cravings Pet Treats LLC, filed an application to register on the Principal Register the mark BARKING BUDDHA (in standard characters) identifying the following goods: “Consumable pet chews; Edible pet treats; Pet beverages; Pet food; Pet treats in the nature of bully sticks” in International Class

¹ Various Trademark Examining Attorneys represented the Trademark Examining Operation (TMEO) during prosecution, briefing and oral hearing.

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The Trademark Examining Attorney refused registration of Applicant's mark under Section 2(d) of the Trademark Act, 15 U.S.C. §1052(d), on the ground of likelihood of confusion with the cited registered mark BUDDHA BISCUITS (in standard characters, "BISCUITS" disclaimed) identifying the following goods: "Edible organic pet treats for dogs" in International Class 31.³

After the Trademark Examining Attorney made the refusal final, Applicant appealed to this tribunal.⁴ Applicant's counsel and the Examining Attorney filed briefs and appeared at an oral hearing before this panel of the TTAB. We affirm the refusal to register.

I. Likelihood of Confusion

We base our determination of likelihood of confusion under Trademark Act Section 2(d) on an analysis of all of the probative facts in evidence that are relevant to the factors enunciated in *In re E. I. du Pont de Nemours & Co.*, 476 F.2d 1357, 177 USPQ

² Application Serial No. 90139331 was filed on August 26, 2020 under Section 1(a) of the Trademark Act, 15 U.S.C. §1051(a), asserting January 2016 as a date of first use of the mark anywhere and in commerce.

³ Registration No. 5723344 issued on the Principal Register on April 9, 2019.

⁴ All citations to documents contained in the Trademark Status & Document Retrieval (TSDR) database are to the downloadable .pdf versions of the documents in the USPTO TSDR Case Viewer. *See, e.g., In re Peace Love World Live, LLC*, 127 USPQ2d 1400, 1402 n.4 (TTAB 2018). References to the briefs on appeal refer to the Board's TTABVUE docket system. Before the TTABVUE designation is the docket entry number; and after this designation are the page references, if applicable. *See, e.g., New Era Cap Co., Inc. v. Pro Era, LLC*, 2020 USPQ2d 10596, *2 n.1 (TTAB 2020).

563, 567 (CCPA 1973) (“*DuPont*”), cited in *B&B Hardware, Inc. v. Hargis Indus., Inc.*, 575 U.S. 138, 135 S. Ct. 1293, 113 USPQ2d 2045, 2049 (2015); see also *In re Guild Mortg. Co.*, 912 F.3d 1376, 129 USPQ2d 1160, 1161-62 (Fed. Cir. 2019).

We have considered all *DuPont* factors that are relevant. See *Cai v. Diamond Hong, Inc.*, 901 F.3d 1367, 127 USPQ2d 1797, 1800 (Fed. Cir. 2018) (quoting *In re Mighty Leaf Tea*, 601 F.3d 1342, 94 USPQ2d 1257, 1259 (Fed. Cir. 2010) (“Not all of the *DuPont* factors are relevant to every case, and only factors of significance to the particular mark need be considered.”)); *ProMark Brands Inc. v. GFA Brands, Inc.*, 114 USPQ2d 1232, 1242 (TTAB 2015) (“While we have considered each factor for which we have evidence, we focus our analysis on those factors we find to be relevant.”).

Varying weights may be assigned to each *DuPont* factor depending on the evidence presented. See *Citigroup Inc. v. Capital City Bank Grp. Inc.*, 637 F.3d 1344, 98 USPQ2d 1253, 1261 (Fed. Cir. 2011); *In re Shell Oil Co.*, 992 F.2d 1204, 26 USPQ2d 1687, 1688 (Fed. Cir. 1993) (“the various evidentiary factors may play more or less weighty roles in any particular determination”).

Two key considerations are the similarities between the marks and the relatedness of the goods. See *Federated Foods, Inc. v. Fort Howard Paper Co.*, 544 F.2d 1098, 192 USPQ 24, 29 (CCPA 1976) (the “fundamental inquiry mandated by §2(d) goes to the cumulative effect of differences in the essential characteristics of the

goods and differences in the marks.”); *In re FabFitFun, Inc.*, 127 USPQ2d 1670, 1672 (TTAB 2018).

A. The Goods and Channels of Trade

The second *DuPont* factor concerns the “similarity or dissimilarity and nature of the goods or services as described in an application or registration,” *In re Stone Lion Capital Partners, L.P. v. Lion Capital LLP*, 746 F.3d 1317, 110 USPQ2d 1157, 1159 (Fed. Cir. 2014); *Hewlett-Packard Co. v. Packard Press, Inc.*, 281 F.3d 1261, 62 USPQ2d 1001, 1004 (Fed. Cir. 2004); *Octocom Sys., Inc. v. Hous. Comput. Servs. Inc.*, 918 F.2d 937, 16 USPQ2d 1783, 1787 (Fed. Cir. 1990). “This factor considers whether ‘the consuming public may perceive [the goods or services] as related enough to cause confusion about the source or origin of the goods and services.’” *In re St. Helena Hosp.*, 774 F.3d 747, 113 USPQ2d 1082, 1086 (Fed. Cir. 2014) (quoting *Hewlett-Packard*, 62 USPQ2d at 1004).

As noted above, Applicant’s goods are: “Consumable pet chews; Edible pet treats; Pet beverages; Pet food; Pet treats in the nature of bully sticks” and the goods identified in the cited registration are: “Edible organic pet treats for dogs.” As identified, Applicant’s “Edible pet treats” encompass the registrant’s more narrowly identified “Edible organic pet treats for dogs.” The goods thus, in part, are overlapping and legally identical. *See, e.g., In re i.am.symbolic, llc*, 127 USPQ2d 1627, 1629 (TTAB 2018) (citing *Tuxedo Monopoly, Inc. v. Gen. Mills Fun Grp., Inc.*, 648 F.2d 1335, 1336,

209 USPQ 986, 988 (C.C.P.A. 1981); *Inter IKEA Sys. B.V. v. Akea, LLC*, 110 USPQ2d 1734, 1745 (TTAB 2014).

In addition, the Examining Attorney introduced into the record evidence in the form of website screenshots from eight third parties offering, under the same trademark or trade name, goods identified in both the involved application and cited registration.⁵ This evidence establishes that the pet products provided by Applicant, and the goods identified in the cited registration frequently emanate from the same source under the same house marks or trademarks.

The Examining Attorney also introduced into the record copies of seven use-based, third-party registrations for marks identifying, inter alia, the goods identified in both the involved application and cited registration.⁶ The following examples are illustrative:

Reg. No. 5563465 for the mark GEFI (in standard characters), identifying

Pet beverages, pet food, pet treats in the nature of bully sticks, edible organic pet treats;

Reg. No. 5258076 for the mark VETERINARIANS PREFERRED (in standard characters), identifying

Pet treats, pet treats in the nature of bully sticks, pet beverages, pet food, edible organic pet treats for all pets; and

⁵ December 22, 2020 first Office Action at 8-38; July 22, 2021 final Office Action at 7-51. These screenshots include Only Natural Pet, Purina, I and Love and You, Castor & Pollux, Flourish, MeatMe, Grandma Lucy's and V-dog.

⁶ July 22, 2021 final Office Action at 52-71.

Reg. No. 6128252 for the mark TailLabs (in stylized form), identifying

Beverages for pets, edible organic pet treats for dogs, pet treats in the nature of bully sticks.

As a general proposition, although use-based, third-party registrations alone are not evidence that the marks shown therein are in use or that the public is familiar with them, they nonetheless have some probative value to the extent they serve to suggest that the goods are of a kind that may emanate from a single source. *See In re Infinity Broad. Corp.*, 60 USPQ2d 1214, 1217-18 (TTAB 2001); *In re Albert Trostel & Sons Co.*, 29 USPQ2d 1783, 1785-86 (TTAB 1993); *In re Mucky Duck Mustard Co.*, 6 USPQ2d 1467, 1470 n.6 (TTAB 1988).

In this case, the totality of the website and third-party registration evidence demonstrates that consumers would readily expect that the registrant's edible organic dog treats and Applicant's pet food and beverages, and pet treats in the nature of bully sticks are likely to emanate from the same source. Thus, as identified, the goods are in part identical, and on the examination record the goods are otherwise related.

With regard to the third *DuPont* factor, the similarity of the trade channels in which the goods are encountered, we must again base our determination on the goods as they are identified in the application and registration at issue. *In re Elbaum*, 211 USPQ 639, 640 (TTAB 1981); *In re William Hodges & Co., Inc.*, 190 USPQ 47, 48 (TTAB 1976); *see also Octocom*, 16 USPQ2d at 1787 ("The authority is legion that the

question of registrability of an applicant's mark must be decided on the basis of the identification of goods set forth in the application regardless of what the record may reveal as to the particular nature of an applicant's goods, the particular channels of trade or the class of purchasers to which the sales of goods are directed").

Because Applicant's goods are legally identical, in part, to the registrant's goods, we presume that such goods move in the same channels of trade and are offered to the same classes of consumers. *See In re Viterro Inc.*, 671 F.3d 1358, 101 USPQ2d 1905, 1908 (Fed. Cir. 2012) (even though there was no evidence regarding channels of trade and classes of consumers, the Board was entitled to rely on this legal presumption in determining likelihood of confusion); *see also American Lebanese Syrian Associated Charities Inc. v. Child Health Research Institute*, 101 USPQ2d 1022, 1028 (TTAB 2011); *Genesco Inc. v. Martz*, 66 USPQ2d 1260, 1268 (TTAB 2003) ("Given the in-part identical and in-part related nature of the parties' goods, and the lack of any restrictions in the identifications thereof as to trade channels and purchasers, these clothing items could be offered and sold to the same classes of purchasers through the same channels of trade"); *In re Smith and Mehaffey*, 31 USPQ2d 1531, 1532 (TTAB 1994).

Accordingly, the *DuPont* factors relating to the similarity or dissimilarity of the goods and the similarity or dissimilarity of their trade channels heavily favor a

finding of likelihood of confusion.⁷

B. The Marks

Under the first *DuPont* factor, we determine the similarity or dissimilarity of Applicant's BARKING BUDDHA mark and the registered BUDDHA BISCUITS mark in their entireties, taking into account their appearance, sound, connotation and commercial impression. *DuPont*, 177 USPQ at 567; *Stone Lion Capital v. Lion Capital*, 110 USPQ2d at 1160; *Palm Bay Imps., Inc. v. Veuve Clicquot Ponsardin Maison Fondée En 1772*, 396 F.3d 1369, 73 USPQ2d 1689, 1692 (Fed. Cir. 2005). "Similarity in any one of these elements may be sufficient to find the marks confusingly similar." *In re Inn at St. John's, LLC*, 126 USPQ2d 1742, 1746 (TTAB 2018) (quoting *In re Davia*, 110 USPQ2d 1810, 1812 (TTAB 2014)) (*affirmed on appeal*); *accord Krim-Ko Corp. v. Coca-Cola Bottling Co.*, 390 F.2d 728, 156 USPQ 523, 526 (CCPA 1968) ("It is sufficient if the similarity in either form, spelling or sound alone is likely to cause confusion.").

Because the similarity or dissimilarity of the marks is determined based on the marks in their entireties, our analysis cannot be predicated on dissecting the marks into their various components; that is, the decision must be based on the entire marks, not just part of the marks. *In re Nat'l Data Corp.*, 753 F.2d 1056, 224 USPQ

⁷ In its briefs, Applicant does not contest the relatedness of the goods and their trade channels.

749, 751 (Fed. Cir. 1985); *see also Franklin Mint Corp. v. Master Mfg. Co.*, 667 F.2d 1005, 212 USPQ 233, 234 (CCPA 1981) (“It is axiomatic that a mark should not be dissected and considered piecemeal; rather, it must be considered as a whole in determining likelihood of confusion.”).

Applicant argues:

The examining attorney argued in the final office action that BARKING merely modifies the word BUDDHA, but the opposite is true. (Internal citations omitted.) Rather, the commercial impression is the two words together and the argument that BARKING is a mere modification is in of itself an improper dissection.⁸

We agree with Applicant that the terms BARKING and BUDDHA, combined, impart the mark’s commercial impression. However, we also agree with the Examining Attorney that the dominant feature of Applicant’s BARKING BUDDHA mark is BUDDHA. BARKING is an adjective that modifies BUDDHA and draws additional attention thereto, suggesting a canine buddha that barks. We reject Applicant’s contention that such a finding involves an improper dissection of the mark. Our finding is based on consideration of the mark in its entirety. To the extent Applicant suggests that BUDDHA modifies BARKING, it does not provide an explanation as to why consumers would so perceive its mark.

Applicant further argues:

The examining attorney also refers to the disclaimer of BISCUITS in a manner that effectively construes BUDDHA BISCUITS as being

⁸ 6 TTABVUE 13.

BUDDHA only. However, the purchasing public sees BUDDHA BISCUITS in its entirety, not BUDDHA only. In particular, BISCUITS informs the purchasing public that the product is for a certain type of food products.⁹

Applicant is correct that in determining likelihood of confusion, disclaimed matter must be considered. *See Kellogg Co. v. Pack “Em Enterprises Inc.*, 14 USPQ 2d 1545 (TTAB 1990); and *Glamorene Prods. Corp. v. Boyle-Midway, Inc., et. al.*, 188 USPQ 145 (SDNY 1975). Moreover, the public viewing the mark is unaware of what, if any, portions of a mark may be disclaimed in a federal registration. *See Nat’l Data*, 224 USPQ at 750.

However, there is nothing improper in stating that, for rational reasons, more or less weight has been given to a particular feature of a mark, provided the ultimate conclusion rests on a consideration of the marks in their entireties. *In Nat’l Data*, 224 USPQ at 751. We agree with Applicant that BISCUITS describes a food product. Inasmuch as the disclaimed term BISCUITS describes a type of pet treat, the dominant, distinctive portion of the registered BUDDHA BISCUITS mark is the term BUDDHA. It is proper to give more weight to this dominant feature in determining the commercial impression created by the mark. *See Nat’l Data*, 224 USPQ at 751.

Applicant argues:

The marks are dissimilar because Applicant’s mark contains the first word BARKING, which BUDDHA BISCUITS does not contain, and because BUDDHA BISCUITS contains the second word BISCUITS which Applicant’s mark does not contain. That is, the existence of the

⁹ 6 TTABVue 11.

word BUDDHA alone does not mean BARKING BUDDHA and BUDDHA BISCUITS are confusingly similar because “BARKING” and “BISCUITS” are not confusingly similar.¹⁰

However, we find that Applicant’s BARKING BUDDHA mark is similar in appearance and sound to the registered BUDDHA BISCUITS mark. Both contain the term BUDDHA and a subordinate term, respectively BARKING and BISCUITS, of the same number of syllables and construction, imparting a similar cadence and alliteration to the marks. The marks are similar in connotation in that Applicant’s mark suggests a canine buddha that barks, and the registered mark suggests a buddha that is the source of pet treats. It is not necessary for the marks to be identical, to have common pronunciation or to rhyme in order to find their similarities outweigh their differences.

“The proper test is not a side-by-side comparison of the marks, but instead whether the marks are sufficiently similar in terms of their commercial impression such that persons who encounter the marks would be likely to assume a connection between the parties.” *Coach Servs. Inc. v. Triumph Learning LLC*, 101 USPQ2d 1713, 1721 (Fed. Cir. 2012) (internal quotation marks omitted). *See also Mini Melts, Inc. v. Reckitt Benckiser LLC*, 118 USPQ2d 1464, 1470 (TTAB 2016); *In re Mr. Recipe, LLC*, 118 USPQ2d 1084, 1089 (TTAB 2016). Consumers may not necessarily encounter the marks in close proximity and must rely upon their recollections thereof over time. *In*

¹⁰ 6 TTABVUE 7 (Applicant’s brief).

re Mucky Duck Mustard, 6 USPQ2d 1467, 1468 (TTAB 1988).

Finally, Applicant cites to numerous cases involving marks unrelated to those at issue in this appeal in support of its contention that BARKING BUDDHA and BUDDHA BISCUITS should be found not confusingly similar.¹¹ However, citations to prior decisions of courts and this tribunal involving marks that do not contain the terms BARKING, BUDDHA or BISCUIT are of very limited probative value, especially without any evidence regarding the underlying facts and records in those cases. “It has been said many times that each case must be decided on its own facts.” *In re Eagle Crest Inc.*, 96 USPQ2d 1227, 1229 (TTAB 2010) (internal citation omitted) and we are not bound by these prior decisions involving unrelated marks.

We find the marks BARKING BUDDHA and BUDDHA BISCUITS to be more similar than dissimilar in appearance and sound, and also to be similar in connotation, such that the marks convey similar commercial impressions. Similarity in any one of the elements of sound, appearance, meaning, or commercial impression is sufficient to support a determination of likelihood of confusion. *See Krim-Ko v. Coca-Cola*, 156 USPQ at 526 (“It is sufficient if the similarity in either form, spelling or sound alone is likely to cause confusion”); *In re White Swan Ltd.*, 8 USPQ2d 1534, 1535 (TTAB 1988) (“In appropriate cases, a finding of similarity as to any one factor

¹¹ 6 TTABVUE 8-11.

(sight, sound or meaning) alone ‘may be sufficient to support a holding that the marks are confusingly similar’”) (citations omitted)).

In our comparison of Applicant’s BARKING BUDDHA mark to the registered BUDDHA BISCUITS mark, we also consider that, “[w]hen marks would appear on virtually identical goods ..., the degree of similarity [of the marks] necessary to support a conclusion of likely confusion declines.” *Century 21 Real Estate Corp. v. Century Life of Am.*, 23 USPQ2d 1698, 1700 (Fed. Cir. 1992); *see also ECI Division of E-Systems, Inc. v. Env’t Commc’ns. Inc.*, 207 USPQ 443, 449 (TTAB 1980). Consumers encountering BARKING BUDDHA and BUDDHA BISCUITS could mistakenly believe the former is a variation on the registered mark used to identify a range of pet foods, beverages and treats of which the registrant’s goods are a subset, but nonetheless emanating from a common source. *See In re Bay State Brewing Co.*, 117 USPQ2d at 1961 (citing *In re Abcor Dev. Corp.*, 588 F.2d 811, 200 USPQ 215, 219 (CCPA 1978)).

For these reasons, we find that the marks are more similar than dissimilar. The first *DuPont* factor thus also weighs in favor of finding a likelihood of confusion.

C. Conclusion

When we consider the record and the relevant likelihood of confusion factors, and all of Applicant’s arguments relating thereto, we conclude that consumers familiar with the registrant’s goods offered under its mark would be likely to believe, upon encountering Applicant’s identical or otherwise closely related goods offered under

its mark originated with or are associated with or sponsored by the same entity.

Decision: The refusal to register Applicant's BUDDHA BISCUITS mark is affirmed under Section 2(d) of the Trademark Act. 15 U.S.C. § 1052(d).